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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LARRY CARSON, Plaintiff and Appellant, v. CABRILLO COLLEGE GOVERNING BOARD et al., Defendants and Respondents.	H025352 (Santa Cruz County Super.Ct.No. CV140067)

Plaintiff Larry Carson (Carson) appeals from judgment entered following the trial court's granting defendants' Cabrillo College Governing Board and Sy Jordan's Motion for Summary Judgment. We will affirm.

STATEMENT OF THE CASE

The instant case is a wrongful termination action initiated by Carson as a result of his placement on a 39-month reemployment list by his employer, defendant Cabrillo College Governing Board (Cabrillo). On January 16, 2001, Carson filed a complaint for damages and injunctive relief against Cabrillo, as well as his supervisor Sy Jordan (Jordan) in Santa Cruz County Superior Court. The first amended complaint was filed on April 19, 2001, and alleged 10 causes of action premised on the assertion that Cabrillo wrongfully placed Carson on the 39-month reemployment list.

On June 28, 2002, Cabrillo and Jordan moved for summary judgment on the grounds that the undisputed facts supported the finding that as of November 10, 1999,[1] Carson had exhausted all available forms of leaves of absence, including paid and unpaid leave, compensatory time off, vacation and other available paid leave, and as such, he was properly placed on the reemployment list pursuant to Education Code sections 88192 and 88195.[2]

On July 26, 2002, the court granted the motion for summary judgment on the grounds that Cabrillo adequately informed Carson of his right to leave time, Carson exhausted all forms of leave, and, under the Education Code, Cabrillo had no duty to so inform plaintiff. Judgment was entered in favor of Cabrillo and Jordan on December 10, 2002.

Carson filed a notice of appeal on December 16, 2002.

STATEMENT OF FACTS

Carson began working for Cabrillo in 1986 as a "Custodial I." As of 1992, Carson had been promoted to the position of "Custodial Specialist." As a Custodial Specialist, Carson was a member of the Service Employees International Union, Local 415, and worked according to the terms of the Collective Bargaining Agreement between the union and Cabrillo. Pursuant to the Collective Bargaining Agreement, Carson was entitled to a number of different types of leave from work, including sick leave, vacation, personal necessity, catastrophic leave, family leave, critical illness of a family member, and general leave.

In response to notification by Carson of his wife's health condition and his need for leave from work, on July 2, 1999, Cabrillo sent Carson a letter detailing all of his

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[1] Cabrillo notified Carson in writing on November 10, 1999, that Carson had exhausted all of his leave time and was being placed on the 39-month reemployment list.

[2] All statutory references are to the Education Code unless otherwise state..

leave balances as of May 31, 1999, as well the additional leave possibilities available to him. The letter stated that as of May 31, 1999, Carson was overdrawn by 27 hours in sick time, had 7.5 hours of compensation in lieu of overtime, and 109.87 hours of vacation. The letter further stated that Carson was eligible for federal Family and Medical Leave, which is unpaid and runs concurrently with paid leave, as well as catastrophic sick leave though union member donations (orchestrated through the union representative), and leave without pay (upon request).

Throughout the period between May 1999 and September 1999, Carson took time off work due to his wife's illness, using a variety of different forms of leave. In October 1999, after returning to work following the birth of his child and his wife's recovery from surgery, Carson became ill. As a result of a stress-related illness, Carson took additional time off from work during the months of October and November 1999. By November 1999, Carson had a zero balance of vacation time, and a negative balance of 77.89 hours of sick time. Carson did not request unpaid general leave from Cabrillo.

On November 10, 1999, Cabrillo placed Carson on the 39-month reemployment list, because Carson had exhausted all forms of leave available to him.
Also on November 10, 1999, Carson applied for Worker's Compensation benefits for his stress related condition. Carson's Worker's Compensation claim was denied.

The first vacancy for a position similar to Carson's as a custodian became available in August 2001, and Cabrillo offered the position to Carson.

DISCUSSION

Standard of Review

The Court of Appeal reviews the grant of a motion for summary judgment de novo, and will assume the role of the trial court in determining the merit of the motion. (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 581.) Summary judgment may be granted "if all the papers submitted show that there is no

triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., § 437c, subd. (c).)

In reviewing the trial court's decision to grant summary judgment, this court must " 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; Code of Civ. Proc., § 437c, subd. (c).) Further, "[t]he purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve [the parties'] dispute." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

In reviewing Cabrillo's motion for summary judgment, the question on appeal is whether Cabrillo owed a duty to notify Carson of his leave balances *before* those balances were fully exhausted. We think not.

Duty to notify plaintiff of leave available

Carson asserts that Cabrillo had a duty "to advise [him] of the amounts of available leave remaining in his account in a timely manner so that [he] would have an opportunity either to request catastrophic leave donations from fellow union members or to request an unpaid leave of absence, as provided in the Collective Bargaining Agreement." In support of this contention, Carson cites both sections 88192 and 88195, as well as the Collective Bargaining Agreement between his union and Cabrillo, as creating the duty to advise him of his available leave before his placement on the 39-month reemployment list. We disagree with Carson, and find no duty on the part of Cabrillo to notify Carson of his available leave under sections 88192 and 88195, or the Collective Bargaining Agreement before placing Carson on the reemployment list.

Applicability of the Education Code

The Education Code applies to Carson's employment because he was a non-academic employee of a community college in California. As such, Carson is considered "classified service" under section 88003, et seq. Additionally, under section 88000, the provisions of the Education Code, specifically, Article 6 (commencing with Section 88190) applies to classified employees of community college districts. As such, sections 88192 and 88195 dealing with placement of an employee on the 39-month reemployment list upon the exhaustion of the employee's leave, applies to Carson.

Section 88192, subdivsion (f) provides, in relevant part: "When all available leaves of absence, paid or unpaid, have been exhausted and if the employee is not medically able to assume the duties of the person's position, the person . . . shall be placed on a reemployment list for a period of 39 months." Section 88195 states a similar requirement, and provides, in relevant part: "If, at the conclusion of all leaves of absence, paid or unpaid, the employee is still unable to assume the duties of his or her position, the employee shall be placed on a reemployment list for a period of 39 months." In addition, section 88195 provides: "A permanent employee of the classified service who has exhausted all entitlement to sick leave, vacation, compensatory overtime, or other available paid leave and who is absent because of nonindustrial accident or illness may be granted additional leave, paid or unpaid, not to exceed six months." This provision of section 88195 provides an employer with discretion to grant additional leave to an employee who has exhausted all of his or her leave.

Pursuant to both sections 88192 and 88195, Cabrillo acted properly in placing Carson on the 39-month reemployment list. It is undisputed that Carson had exhausted all of his leave as of November 10, 1999, the date on which he was placed on the reemployment list. Additionally, it is undisputed that Carson was "unable to assume the duties of his . . . position," due to stress-related illness as of November 10, 1999. (§§ 88192; 88195.) Finally, it is undisputed that Carson did not request any unpaid leave

from Cabrillo. Therefore, under the provisions of section 88192, Carson's placement on the 39-month reemployment list was proper.

Carson asserts he should not have been "automatically" placed on the reemployment list, and that "[t]he common sense interpretation of . . . sections 88192 and 88195 is that the employee should be given an opportunity to avail himself of all forms of leave, paid or unpaid . . . ." We disagree. There is no express language in the Education Code that imposes such a duty on a community college district, and Carson cites no authority for the proposition that the Education Code mandates such a duty. Therefore, we agree with the trial court that Cabrillo had no duty under the Education Code to notify Carson of his leave balance before placing him on the 39-month reemployment list.

In addition, although Cabrillo had no duty to do so, Cabrillo did in fact notify Carson of his leave balances prior to placing Carson on the reemployment list. It is undisputed that Cabrillo notified Carson by mail on July 2, 1999, outlining Carson's leave balances as of May 31, 1999, and the various forms of leave available to him at that time. The fact that Carson did not avail himself of the opportunity to request personal leave without pay from the Governing Board, or request donation of leave from his Union representative as outlined in the letter, before the exhaustion of his leave, did not prohibit Cabrillo from placing Carson on the reemployment list.

Cabrillo had no duty to inform Carson of his available leave balances in advance of placing him on the reemployment list pursuant to sections 88192 and 88195.

Collective Bargaining Agreement

Carson contends the Collective Bargaining Agreement between his union and Cabrillo imposed a duty on Cabrillo to notify him of his leave balances prior to placing him on the reemployment list. We disagree. The only requirement stated in the Collective Bargaining Agreement relating to leave balances for employees of Cabrillo is record keeping. The Collective Bargaining Agreement states: "The District will keep records on employee family and medical leaves that will enable a verification of the leave

taken, leave remaining, and other provisions of this policy." In the instant case, it is undisputed that Cabrillo did keep leave records on Carson, including family and medical leave taken. Indeed, Cabrillo satisfied its requirements under the Collective Bargaining Agreement in maintaining a record of Carson's leaves, and acted beyond its requirements in sending the letter dated July 2, 1999, notifying Carson of his leave balances and opportunity for unpaid leave. It is clear from the record that the Collective Bargaining Agreement did not impose a duty upon Cabrillo to notify Carson of available leave balances before placing Carson on the reemployment list.

Due Process Violation

On appeal, Carson asserts to the extent Cabrillo placed Carson on the reemployment list "automatically," pursuant to sections 88192 and 88915, Cabrillo violated Carson's due process rights by terminating his "property interest in continued receipt of his paycheck," without a hearing. We disagree. The cases Carson cites in support of this contention are inapposite. (*Gilbert v. Homar* (1997) 520 U.S. 924; *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95.) *Gilbert* involved the failure to provide a suspended public employee with a post-suspension hearing, while *Bostean* involved the placement of a public employee on indefinite involuntary illness leave without providing the employee a hearing. (*Gilbert v. Homar, supra*, 520 U.S. at pp. 935-936; *Bostean v. Los Angeles Unified School Dist.*, *supra*, 63 Cal.App.4th at p. 102.) In both cases, the courts considered the disciplinary nature of the employers' actions, and the employees' property right in continued employment. Such actions by the employers necessarily implicated the employees' due process rights.

In the instant case, Carson did not suffer disciplinary action by Cabrillo. Carson was not suspended, as the employee in *Gilbert* was, nor was he placed on an involuntary illness leave, as the employee in *Bostean* was. Rather, Carson used all of his available leave and was placed on a 39-month reemployment list as a result. Placement on the reemployment list is not considered a break in service, because pursuant to the Education

Code, the employee must be restored to his former position if a position is available and if he or she is able to resume the duties of the position. (§§ 88192; 88195.) Therefore, Cabrillo's act of placing Carson on the reemployment list pursuant to sections 88192 and 88195 was not a violation of Carson's right to due process.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

Wunderlich, J.

WE CONCUR:

Rushing, P.J.

Mihara, J.